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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GREG MURROW,

Plaintiff and Appellant,

v.

PAYPAL, INC.,

Defendant and Respondent.

H045352

(Santa Clara County

Super. Ct. No. 17CV311767)

Appellant Greg Murrow, the owner of a now-defunct business called Freedom Stamps, appeals from a judgment of dismissal entered against him and others after the trial court sustained a demurrer brought by PayPal, Inc. without leave to amend. As explained further below, we conclude that the trial court properly sustained the demurrer but abused its discretion in not allowing Murrow leave to amend certain causes of action. Accordingly, we reverse the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

We summarize the facts underlying this action assuming, as we must on review of a judgment of dismissal after a demurrer is sustained without leave to amend, the truth of all properly pleaded allegations in Murrow's complaint. (*Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 753.)

Murrow was the sole proprietor of Freedom Stamps, a stamp dealer that had a merchant account with PayPal, Inc. (PayPal) to handle certain monetary transactions. Murrow would send money (presumably through PayPal) to Marie Rouse of Freedom Stamps Procurement¹ so that she could buy stamps on behalf of Murrow when he was busy and needed help. Murrow alleged that PayPal talked Rouse into opening Freedom Stamps Procurement by telling her she needed to get her own business account.

Murrow's complaint centers on a number of e-mails, which he attached to the complaint, from PayPal to Freedom Stamps (Murrow's company) and to Freedom Stamps Procurement (Rouse's company). For example, PayPal sent numerous email notices to Freedom Stamps about various chargebacks.² The notices involved different transactions but contained substantially similar wording. One such notice stated, "We were recently notified that you initiated a chargeback with your credit card issuer because you did not recognize this transaction." The notice listed the "Seller's name" (that is, the other party to the disputed transaction) as "Freedom Stamps/Stamp Procurement." The notice further stated, "To prevent unauthorized activity on your account, we have limited what you can do with your PayPal account. [¶] . . . We are working with your card issuer to resolve this chargeback. If you recognize this transaction and consider it as valid, please let your card issuer know, and cancel the chargeback in your Resolution Center."

¹ The complaint states that Freedom Stamps Procurement was not actually a separate business but rather was simply a "petty cash fund." In addition to her connection with Freedom Stamps Procurement, Rouse was also the vice president of Freedom Stamps. Although the relationship between Murrow and Rouse is not clear from the record, they apparently live or have lived together. Freedom Stamps Procurement is also referred to at various points in the record as Freedom Stamps/Stamp Procurement. We generally refer to it as Freedom Stamps Procurement.

² A "chargeback" is a charge that is returned to a payment card after a customer successfully disputes an item on his account transactions report. (Investopedia, Chargeback (Mar. 2, 2018), < <https://www.investopedia.com/terms/c/chargeback.asp> > [as of February 15, 2019], archived at: <<https://perma.cc/T584-G7XB>>.)

PayPal sent companion notices to Freedom Stamps Procurement (Rouse's company) that stated, "The buyer stated that they did not authorize this purchase. We did not receive the necessary documentation we requested from you, so we were unable to dispute the case with your buyer's financial institution." The notice listed the "buyer" as "Freedom stamps [*sic*]" with an email address for the buyer of gregmorrow@gmail.com. The notice further indicated that PayPal was charging a "chargeback fee" of \$20.00 to Freedom Stamps/Stamp Procurement. Other emails sent to Freedom Stamps/Stamp Procurement stated that PayPal had received notice from the buyer's "financial institution" that the financial institution had decided a certain of the disputed amounts in "buyer's favor," and PayPal had debited the disputed amount from Rouse's PayPal account for Freedom Stamps Procurement.³

PayPal sent a number of emails to Rouse notifying her that her PayPal account had a negative balance. One such notice, for example, stated that her account had a negative balance of \$8,680.90 and had "been negative for at least 36 days." The PayPal account for Freedom Stamps Procurement incurred a balance of over \$21,418.00. Murrow's complaint states that neither he nor Freedom Stamps bought any stamps from Rouse or Freedom Stamps Procurement or initiated any chargebacks related to such purchases.

In June 2017, Murrow filed a lawsuit on behalf of Freedom Stamps, as well as on behalf of Rouse and Freedom Stamps Procurement. The complaint alleged that Freedom Stamps no longer exists because it was "wiped out" by PayPal. The complaint does not articulate separate causes of action but alleges in its preliminary statement that there are "4,017 separate counts," apparently including a defamation count for each of the emails attached to the complaint. PayPal's briefing in the trial court and on appeal refers to

³ The copies of the emails attached to the complaint indicate, by their headers, that Murrow would forward his emails to Rouse, and Rouse would forward to Murrow emails sent to her by PayPal.

eight causes of action. Murrow's opening brief on appeal refers to 14 causes of action, although it is not clear what these causes of action are—other than defamation, libel, and slander—which Murrow refers to as the first three causes of action.

It appears that Murrow's complaint alleges the following causes of action: defamation, libel, slander, negligent infliction of emotional distress, fraud, violations of various federal criminal statutes (in particular, title 18 United States Code section 1038, title 18 United States Code section 35, and title 18 United States Code section 2292), violations of the Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and violations of Penal Code sections 31, 182, and 532.⁴ Although the complaint alleges (without providing any specifics) various types of fraud, including deceit, constructive fraud, negligent misrepresentation, "concealment fraud," and "business fraud," Murrow's general theory of fraud appears to be that PayPal fraudulently induced Rouse to open a PayPal account for Freedom Stamps Procurement and then caused her to incur a balance of over \$21,418.00 as a result of chargebacks that PayPal fabricated.

PayPal filed a demurrer to the complaint. It contended that Murrow could not represent Rouse or Freedom Stamps Procurement because he was not licensed to practice law. PayPal also argued that all of Murrow's claims were insufficiently pled under section 430.10, subdivision (e) of the Code of Civil Procedure, and that leave to amend should be denied because Murrow could not cure any of the deficiencies in his complaint. Murrow does not appear to have filed an opposition to the demurrer.⁵

⁴ Murrow also alleged various violations by PayPal of its own code of business ethics but does not appear to allege any type of actionable claim, such as breach of contract.

⁵ The trial court's ruling on the demurrer references a "reply" submitted by Murrow, but no such document appears in the record on appeal.

The trial court issued a tentative ruling sustaining PayPal's demurrer without leave to amend. In its tentative ruling, the trial court found that "Plaintiff Freedom Stamps aka Greg Murrow has not stated how the deficiencies pointed out in the demurrer could be cured," and that "Each of the 8 causes of action asserted fail to state facts sufficient to constitute causes of action against defendant. Moreover, Mr. Murrow may not act on behalf of Marie Rouse and Freedom Stamps Procurement because he is not a licensed California attorney." Murrow appeared telephonically at the hearing on the demurrer. Neither party has included a reporter's transcript of the hearing in the record on appeal.

The trial court issued an order sustaining without leave to amend PayPal's demurrer to the complaint. The trial court denied Murrow leave to amend because Murrow "has not stated how the deficiencies pointed out in the demurrer could be cured" either "in his reply or at oral argument." The trial court further found that "[e]ach of the 8 causes of action asserted fail to state facts sufficient to constitute causes of action against defendant. Moreover, Mr. Murrow may not act on behalf of Marie Rouse and Freedom Stamps Procurement because he is not a licensed California attorney."

The trial court entered judgment dismissing the complaint with prejudice and awarding costs to PayPal.

Acting on behalf of himself and his former business Freedom Stamps, Murrow represented himself in the trial court, and he does so on appeal. Murrow asserted in the trial court, as he also does here, that he also represents Marie Rouse. However, the notice of appeal lists only "Freedom Stamps aka Greg Murrow" as the party on appeal. Murrow does not assert he is licensed to practice law in the State of California or in any other jurisdiction, and the record does not contain any information indicating that he is a licensed attorney.

II. DISCUSSION

Although his arguments on appeal are not entirely clear, Murrow appears to contend that the trial court erred by (1) following improper procedures when it ruled on

the demurrer before conducting a case management conference and before PayPal had met and conferred with Murrow, as required by Code of Civil Procedure section 430.41, subdivision (a) (hereafter section 430.41(a))⁶; (2) finding that all of Murrow's causes of action were insufficient as a matter of law; and (3) failing to grant Murrow leave to amend his complaint. Before turning to Murrow's contentions, we address the scope of our jurisdiction and Murrow's claim to represent Rouse.

A. Jurisdiction and Representation

The notice of appeal lists only "Freedom Stamps aka Greg Murrow" as the party on appeal, and not coplaintiffs Rouse or Freedom Stamps Procurement.⁷ Although the civil case information statement filed by Murrow describes Rouse as an "appellant," it is the notice of appeal that defines the scope of the appeal. (Cal. Rules of Court, rule 8.100(a)(2); see *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.) Therefore, Rouse and Freedom Stamps Procurement are not parties to this appeal.⁸

Moreover, Murrow does not contend that he is a licensed attorney that may represent either of these other parties, and he does not argue the trial court erred when it found that he is not a licensed attorney in California. There is no indication in the record that Murrow is licensed to practice law in the State of California or in another jurisdiction. Murrow argues that he was "allowed to defend" Rouse because she "was Vice President of Freedom Stamps," but provides no legal authority for his contention

⁶ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

⁷ Murrow was the sole proprietor of Freedom Stamps, which is not a separate legal entity (and, in any event, no longer exists). We therefore refer to appellant as "Murrow." (See *Twenty-Nine Palms Enterprises Corporation v. Bardos* (2012) 210 Cal.App.4th 1435, 1450.)

⁸ Murrow also requests that this court transfer his case to Las Vegas, where he resides. Murrow does not provide any legal authority supporting this request and has thereby forfeited it. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

and thus has forfeited this argument. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.) Further, “one who is not a licensed attorney cannot appear in court for another person,” and even “a corporate officer, who is not an attorney, may not appear on behalf of the corporation.” (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 547–548; see also *Abar v. Rogers* (1981) 124 Cal.App.3d 862, 865 [holding that a husband who was not a licensed attorney in California could not represent his wife].)

B. *Timing of the Trial Court’s Order*

Murrow argues that the trial court violated his due process rights by failing to hold a case management conference, as provided for in the local rules of court, prior to the trial court’s sustaining of the demurrer. Rule 1 of the relevant local rules states in part that “the Clerk of the Court will schedule the first Case Management Conference approximately 120 days from the date of filing the complaint.” (Super. Ct. Santa Clara County, Civ. Local Rules, rule 1.F.) However, rule 1 states that the clerk will “schedule” the conference; it does not on its face bar the trial court from conducting the hearing on the demurrer (which there is no dispute Murrow attended) or ruling on a demurrer before any such case management conference occurs.⁹ Even assuming for the sake of argument that the trial court’s failure to hold a case management conference was a violation of rule 1, Murrow cites no authority for the proposition that his due process rights were thereby violated. On appeal “the party asserting trial court error may not . . . rest on the bare assertion of error but must present argument and legal authority on each point raised.” (*Boyle v. CertainTeed Corporation* (2006) 137 Cal.App.4th 645, 649, citation omitted.) By failing to present argument and authority, Murrow has waived any challenge to the

⁹ Murrow also refers to misconduct by the trial court judge at the hearing or at other occasions, but he provides no record for this court to evaluate such alleged misconduct, such as a hearing transcript, and thus has waived any such argument on appeal. Even though he is self-represented, Murrow must present an adequate record demonstrating purported error by the trial court. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

trial court's failure to hold a case management conference before sustaining the demurrer. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Murrow also appears to contend that the timing of the trial court's ruling violated section 430.41(a) because PayPal failed to meet and confer with Murrow prior to filing its demurrer. Although section 430.41(a) does require a party seeking to file a demurrer (in this case, PayPal) to meet and confer with the other side prior to filing its demurrer, it does not prohibit the trial court from ruling on a demurrer absent such a conference. To the contrary, section 430.41, subdivision (a)(4) states that even a determination that "the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Therefore, the trial court did not err in sustaining the demurrer before the occurrence of the case management conference or a sufficient meet-and-confer conference under section 430.41(a).¹⁰

C. Sufficiency of Murrow's Causes of Action

Murrow contends that the trial court erred in sustaining PayPal's demurrer because he adequately pled facts sufficient to state causes of action. (§ 430.10, subd. (e).) "We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law." (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1190 (*Thompson*).) "[W]e assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, citations omitted (*Moore*).) "We do not, however, assume the truth of contentions, deductions, or

¹⁰ We deny Murrow's request to dismiss "Respondents [*sic*] Reply," which we understand as a request to dismiss PayPal's brief on appeal, because he has provided no legal argument in support of his request. (See *Badie, supra*, 67 Cal.App.4th at pp. 784–785.) Murrow also claims PayPal prevented his "access to paperwork" but does not explain any grounds for his argument or what relief he is seeking, and so we determine he has failed to raise any discernable issue for us to review.

conclusions of fact or law.” (*Ibid.*) We also may take judicial notice of attached documents and admissions in prior sworn statements and pleadings that may conflict with the allegations of the complaint at issue. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)¹¹

If the trial court has sustained the demurrer without leave to amend, as it did here, we decide whether there is a reasonable possibility that the defect can be cured by amendment. The burden is on the plaintiff to show that an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) Although our review is de novo, our scope of review is limited to those issues that have been adequately raised and supported by the appellant. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

1. Defamation, Libel, and Slander Causes of Action

Murrow alleges PayPal committed defamation, libel and slander against him and his prior business Freedom Stamps when it made false statements (either in writing through emails or orally) that Freedom Stamps (Murrow’s company) bought stamps from Freedom Stamps Procurement (Rouse’s company) and then initiated “chargebacks” related to those transactions. PayPal’s principal objection to these causes of action is that the emails or any alleged oral statements were never “published” to any third parties.¹²

¹¹ Murrow filed with this court a “Motion for Judicial Review,” which we understand to be a motion for judicial notice. The motion largely contains a copy of his complaint and accompanying exhibits. These documents are already contained in the record on appeal in PayPal’s appellate appendix. The motion also references other miscellaneous documents such as a “business license” and “Greyhound tickets.” Because the complaint and exhibits otherwise appear in the record on appeal and the remaining materials are irrelevant, we deny Murrow’s motion.

¹² PayPal also argues that the emails merely contained computer-generated messages regarding the PayPal accounts at issue that do not contain any defamatory or libelous statements. PayPal also contends that all of Murrow’s claims are barred by the defense of unclean hands because the complaint facially disclosed that there were “suspicious cash advance activities between the PayPal accounts held by Murrow and

“Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 (*Maldonado*).) Defamation has two forms, libel and slander. (Civ. Code, §§ 44, (a)–(b).) Libel involves defamatory publications that are made “by writing, printing, picture, effigy, or other fixed representation to the eye.” (Civ. Code, § 45.) Slander involves a false and unprivileged publication that is “orally uttered” (Civ. Code, § 46), which means “communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made.” (*Maldonado, supra*, 72 Cal.App.4th at p. 645.)

Neither Murrow’s complaint nor the attached exhibits establishes that any person or entity other than Murrow, Rouse, or PayPal saw or heard the statements Murrow challenges. PayPal sent the e-mails at issue directly to either Murrow’s or Rouse’s own e-mail addresses. There is no indication PayPal otherwise disseminated the content of those e-mails—even assuming they contained defamatory statements—to any third party.¹³

Rouse and that the resulting harm, if any, was a result of their own actions.” In light of our conclusion that Murrow cannot show that PayPal published the statements or otherwise disseminated them to a third party, we need not reach these alternative arguments in reviewing the trial court’s sustainment of the demurrer.

¹³ In a “victim impact statement” (capitalization omitted) attached as an exhibit to the complaint, Murrow alleges PayPal caused the chargebacks and then, “Apparently they told countless people outside of Paypal [*sic*].” It is not clear whether this allegation refers to written or oral statements, or who these “countless people” were, if not Murrow and Rouse, and whether we should deduce that these were third parties. We are not required to “assume the truth of contentions, deductions, or conclusions of fact or law.” (*Moore, supra*, 51 Cal.3d at p. 125.) Moreover, even assuming this allegation satisfies the element of publication, it does not adequately allege how informing these unspecified people about the chargebacks in general caused any special injury to Murrow. (See *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387-388.)

While Murrow correctly notes that even a publication to a single third party rather than a large group is sufficient, he does not actually point us to any such third party in the record. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306.) Moreover, even assuming Murrow or Rouse forwarded these emails or relayed any oral statements by PayPal to other individuals, these actions would not constitute publication, given that “[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant.” (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 (*Live Oak*).)¹⁴ As publication to a third person is necessary to establish a cause of action for defamation, libel, or slander, we conclude that the trial court properly sustained the demurrer as to those claims. (See *Thompson, supra*, 11 Cal.App.5th at p. 1190.)

2. Remaining Causes of Action

Murrow’s complaint also alleges claims of negligent infliction of emotional distress, fraud, violations of various criminal federal statutes (such as a violation of title 18 United States Code section 1038), violations of the Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and violations of various provisions of the California Penal Code. However, Murrow has failed to present any legal argument to support any claimed error by the trial court.¹⁵ As a general rule, “[a] judgment or order of the lower court is presumed correct [with] [a]ll intendments and

¹⁴ The only exception to this rule requires a foreseeable republication by the plaintiff prompted by physical necessity or duress under circumstances where the republication is compelled in order to disprove the defamatory statements. (*Live Oak, supra*, 234 Cal.App.3d at p. 1284.) Murrow does not allege that this limited exception applies.

¹⁵ In his brief, Murrow does not mention his other causes of action by any specific claim but rather refers them to as his “5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th Causes of Action[].” He does not make reference to any fourth cause of action. However, the other three causes of action he addresses with any legal argument are those related to defamation, libel, and slander.

presumptions . . . indulged to support it on matters as to which the record is silent.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) To obtain reversal, the appellant must affirmatively demonstrate error on the record before the court. (*Ibid.*) “When an appellant fails to raise a point, or asserts it but fails to support it with a reasoned argument and citations to authority, we treat the point as waived.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) This court must hold a self-represented litigant to the same procedural rules as an attorney. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 (*Nwosu*).)

Murrow’s briefing does not provide any argument or legal authority demonstrating that the trial court erred when it sustained the demurrer to these claims. Therefore, he has forfeited any challenge to this aspect of the trial court’s order.¹⁶

D. *Leave to Amend*

Finally, we consider whether the trial court should have granted leave to amend Murrow’s complaint, in this case an original complaint. When a trial court sustains a demurrer without leave to amend, “we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando, supra*, 31 Cal.4th at p. 1081.)

¹⁶ PayPal requests us to dismiss Murrow’s appeal in its entirety based on various procedural defects in Murrow’s brief. We agree that Murrow’s brief fails to follow several procedural requirements, which could justify a finding that he has waived any argument on appeal. (*Nwosu, supra*, 122 Cal.App.4th at p. 1246.) For instance, Murrow’s brief fails to “support any reference to a matter in the record by a citation to the record.” (Cal. Rules of Court, rule 8.204(a)(1)(C).) Nevertheless, we have elected to consider Murrow’s appeal on its merits.

“When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.” (§ 472c, subd. (a).) With respect to an original complaint, “[u]nless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not.” (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303–304 (*McDonald*).) “If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment.” (*Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 258 (*Apple*).) “In our view an abuse of discretion could be found, absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff’s theory of the case.” (*CAMSI IV v. Hunter Technology Corporation* (1991) 230 Cal.App.3d 1525, 1542.)

We turn first to Murrow’s claims for negligent infliction of emotional distress and his claims arising under federal criminal law, the United States Constitution, and the California Penal Code. With respect to these claims, we do not see a reasonable possibility that Murrow’s pleading can be amended to overcome their fundamental defects. (*Schifando, supra*, 31 Cal.4th at p. 1081.) Regarding the claim for negligent infliction of emotional distress, there appears to be no cognizable legal duty that PayPal had towards Murrow that would support any negligence claim under a theory of negligent infliction of emotional distress. (See *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378.)

Similarly, we conclude that Murrow could not allege any facts that would support a viable claim under the criminal federal statutes he invokes—in particular, section 1038 of title 18 of the United States Code, section 35 of title 18 of the United States Code, and

section 2292 of title 18 of the United States Code. As PayPal correctly notes, these statutes are inapplicable to the facts asserted in Murrow's complaint.¹⁷ Similarly, a private citizen like Murrow cannot assert a cause of action under sections 182 and 532 of the Penal Code.¹⁸ (See *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142.)

Murrow's claims of violations of the Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution also fail as a matter of law, which no amendment of the complaint could cure. The Fifth Amendment provides that an individual's liberty and property interests cannot be deprived without "due process of law," but it only applies to federal governmental action, not to private actors such as PayPal.¹⁹ (See *Geneva Towers Tenants Org. v. Federated Mortgage Investors* (9th Cir. 1974) 504 F.2d 483, 487.) The Eighth Amendment also has no application here as it

¹⁷ Section 1038 of title 18 of the United States Code authorizes "criminal and civil penalties when a person provides false information or conducts a hoax with respect to crimes . . . [of a particular military or defense nature]." Section 1038 is limited to hoaxes regarding a narrow range of military and infrastructure-related threats, and so is inapplicable to the present matter. (See *Cohen v. Nevada* (D.Nev. Dec. 13, 2007, No. 3:07-cv-00043-LRH) 2007 WL 4458174, *2, fn. 2.) Section 35 of title 18 of the United States Code prohibits conveying "false information, knowing the information to be false, concerning an attempt or an alleged attempt . . . to do any act which would be a crime," and such claims typically involve hoaxes related to airplane bombs. Section 2292 of title 18 of the United States Code prohibits conveying false information in the context of vessels or maritime facilities.

¹⁸ Penal Code section 182 subdivision (a)(1) makes it unlawful for two or more persons to conspire to "commit any crime" as well as certain other conspiratorial acts that may be punishable by imprisonment or, in some cases, by fine under Penal Code section 182 subdivision (a)(6). (Pen. Code, § 182 subds. (a)(1) & (a)(6).) Penal Code section 532 subdivision (a) makes it a crime to obtain money through false pretenses. (Pen. Code, § 532 subd. (a).) Finally, although Murrow also cites to section 31 of the Penal Code, the provision merely defines the "principals in any crime" to include any person who aids and abets in the commission of the crime. (Pen. Code, § 31.)

¹⁹ The Fifth Amendment also protects other fundamental rights such as the right against self-incrimination and double-jeopardy, but these rights are also not at issue here. (U.S. Const., 5th Amend.)

prohibits “the infliction of cruel and unusual punishment on prisoners.” (*Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1196.) The Ninth Amendment²⁰ does not provide any independent constitutional rights for purposes of making out a constitutional violation. (See *San Diego County Gun Rights Committee v. Reno* (9th Cir. 1996) 98 F.3d 1121, 1125.) Finally, the Fourteenth Amendment requires state government action, also not present here. (See *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 838.) Accordingly, the trial court did not abuse its discretion in sustaining the demurrer as to these causes of action without leave to amend.

Nevertheless, we conclude that the trial court did abuse its discretion by not allowing Murrow leave to amend his claims for defamation, libel, slander, and fraud.²¹ While PayPal correctly points out that Murrow has failed to offer any new allegations on appeal, there is also no dispute that the trial court did not provide Murrow the option of amending his original complaint—an opportunity typically granted by trial courts. (*McDonald, supra*, 180 Cal.App.3d at p. 303; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 7:129 [“Even if a demurrer is sustained, leave to amend the complaint is routinely granted. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent.”].)

On appeal, Murrow alleges that “[m]any people have seen PayPal’s emails, all of them.”²² Although these allegations do not themselves cure the substantive defects of

²⁰ The Ninth Amendment states, “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” (U.S. Const., 9th Amend.)

²¹ In determining that Murrow should have another opportunity to allege a viable cause of action, we do not express any opinion on the underlying merits of any such action, even assuming he is able to successfully state a cause of action.

²² Similarly, Murrow filed in the trial court following the issuance of its order an “Opposition [t]o [t]he Dismissal” that alleged that “[n]umerous people had read

failing to allege publication or dissemination to third parties, it is reasonably possible that Murrow could cure the defects with respect to the defamation, libel, and slander claims by supplying additional allegations. (*Apple, supra*, 18 Cal.App.5th at p. 258.) We note, for example, that PayPal’s own emails reference the involvement of at least one “financial institution” in the chargebacks which may suffice to constitute the necessary third party.²³

With respect to his fraud claim, Murrow’s complaint on its face does not foreclose the possibility of amendment. PayPal argues that Murrow failed to allege the requisite specificity for fraud but does not contend that any fundamental legal defect, such as the applicable statute of limitations, bars Murrow’s claim. Therefore, there is a reasonable possibility that Murrow could supply such additional allegations.²⁴

For these reasons, we conclude that the trial court abused its discretion in failing to afford Murrow an opportunity to amend his complaint as to the defamation, libel, slander, and fraud claims, and we direct the trial court to grant Murrow’s leave to amend those claims, should he seek leave to do so.

III. DISPOSITION

The judgment of dismissal in favor of PayPal is reversed as to the claims alleged by Murrow and the matter is remanded. The trial court is directed to vacate its order sustaining the demurrer without leave to amend and to enter a new and different order

documents, been told what was going on” regarding PayPal’s wrongful claims of chargebacks. However, he did not allege who did the telling.

²³ We express no opinion on the merits of this point; we merely observe that this is a reasonable possibility.

²⁴ PayPal argues that Murrow’s case should be barred outright because of Murrow’s “unclean hands” due to the “suspicious cash advances” reflected in the complaint. However, under PayPal’s own theory the advances were merely “suspicious” rather than definitively wrongful, and the complaint’s allegations do not “compel the conclusion” that Murrow committed any wrongful act. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 643.)

sustaining the demurrer with leave to amend his causes of action for defamation, libel, slander, and fraud. In the interests of justice, the parties are to bear their own costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(5).)

DANNER, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

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